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No. 93-1074

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

CELLSWITCH L.P. *et al.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF PRIVATE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly determined that the Federal Communications Commission did not act in an arbitrary and capricious manner when it dismissed the cellular applications of petitioners because those applications were not filed in compliance with the applicable rules of the agency concerning alien ownership.

2. Whether the court of appeals correctly declined to apply strict scrutiny to Congress' limitation on the holding of common carrier radio licenses by aliens, as set forth in the Communications Act of 1934, as amended, 47 U.S.C. § 310(b).

PARTIES TO THE PROCEEDING

Petitioners are listed in the Petition. Respondent Federal Communications Commission was appellee below. Private respondents, AAT RSA Company, L.P., Michael B. Azeez, CSH Cellular, Gilcom Cellular, L.P., Marco Communications Corp., RSA Cellular Company, and Percival Vaz were intervenors below. Miscellco Communications, Inc., is the successor in interest to PC Cellular, Inc., which was also an intervenor below.

Pursuant to Rule 29.1 of the Rules of this Court, private respondents state that they have neither parent nor subsidiary companies, except those that are wholly owned.

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BRIEF OF PRIVATE RESPONDENTS IN OPPOSITION

Private respondents, AAT RSA Company, L.P., Michael B. Azeez, CSH Cellular, Gilcom Cellular, L.P., Marco Communications Corp., Miscellco Communications, Inc., RSA Cellular Company, and Percival Vaz, respectfully request that this Court deny the petition for a writ of certiorari, seeking review of the District of Columbia Circuit's decision in this case.

STATEMENT OF THE CASE

Nature Of The Case. Petitioners applied to the Federal Communications Commission for authorizations to construct and operate cellular systems in the Rural Service Areas ("RSAs"). Each petitioner had its application dismissed by the FCC because each petitioner was a general partnership that included one or more alien general partners in violation of the alien ownership re-

strictions of the Communications Act of 1934, as amended, 47 U.S.C. § 310(b) (the "Act"). The United States Court of Appeals for the District of Columbia Circuit held that the FCC acted reasonably in interpreting the alien ownership restrictions of the Act and in dismissing petitioners' applications because they did not comply with the FCC's strict rules for processing RSA cellular applications.

Regulatory Framework. In 1981, the FCC released rules governing the licensing of cellular service. *Cellular Communications Systems*, 86 F.C.C.2d 469, 470 (1981), *recon.*, 89 F.C.C.2d 58, *further recon.*, 90 F.C.C.2d 571, *order*, 52 Rad. Reg. 2d (P&F) 401 (1982). The Commission initially adopted a comparative hearing process to award licenses in the top 30 markets, the Metropolitan Statistical Areas ("MSAs"). 86 F.C.C.2d at 498-500. The Commission, stressing the need to "avoid undue delay in awarding cellular licenses," adopted "special procedures for processing cellular applications," including a restriction permitting applicants to proffer only minor technical amendments for good cause.[1] 89 F.C.C.2d at 90-91.

Faced with more applications than expected in the top markets and a large processing backlog, the Commission decided to award cellular licenses by lottery after the top-30 markets.[2] The Commission initially emphasized, however, that applications:

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[1] After receiving 194 applications for the top 30 cellular markets, the Commission received nearly 250 amendments to those applications. *Order*, 52 Rad. Reg. 2d (P&F) 401, 402 (1982). These amendments had "a severe disruptive effect on the orderly processing of cellular applications," and the Commission explicitly prohibited the filing of any additional amendments until the publication of a hearing designation order. *Id.* at 402.

[2] *Selection from Among Competing Cellular Applications Using Random Selection or Lotteries Instead of Comparative Hearings*, 98 F.C.C.2d 175, 221-22 (1984) (*"Cellular Lottery Rulemaking"*),

> will have to be acceptable for filing under our cellular rules. The staff will carefully pre-screen the cellular applications to ensure that deficient applications are not considered in the lottery. We have in the past returned cellular applications that were unacceptable and we intend in the future to continue this practice.

Cellular Lottery Rule Making, 98 F.C.C.2d at 185 (footnotes omitted). Pre-screening the cellular applications to determine their compliance with all of the FCC's rules, however, overwhelmed the FCC staff and added to the delays in processing cellular applications.

When faced with even larger numbers of applications filed for the lotteries, the Commission abandoned detailed pre-screening of applications. *Cellular Lottery Further Recon.*, 59 Rad. Reg. 2d (P&F) at 409-10. Under the revised processing system, applications with a proper certification that contained certain minimal information were included in the lottery.[3] Following the lottery, only the winning application was reviewed by the staff to determine whether it met all of the FCC's rules and thus was acceptable for filing. *Id.* at 410. Minor amendments were authorized for the winning applicant only after the Commission staff determined that the application complied steadfastly with all of the FCC's rules and designated the applicant a tentative selectee. *Id.* These same streamlined filing and processing requirements were applied to MSA and RSA applications. *Rules for Rural Cellular Service*, 60 Rad. Reg. 2d (P&F) 1029, 1035

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recon., 58 Rad. Reg. 2d (P&F) 677 ("*Cellular Lottery Recon.*"), *further recon.*, 59 Rad. Reg. 2d (P&F) 407 (1985) ("*Cellular Lottery Further Recon.*").

[3] The Commission adopted a "letter perfect" standard that required applications to contain a limited amount of precise information that identified the applicant and the market for which an authorization was sought; applications not containing this information were returned. *Cellular Lottery Recon.*, 58 Rad. Reg. 2d (P&F) at 696.

(1986). Specifically, the Commission permitted no amendments prior to the lottery and only minor amendments by the tentative selectee after the lottery. All applicants were prohibited from filing proposals that did not comply with the FCC's rules. Thus, applicants could not reasonably expect to amend applications to bring them into compliance with the rules, either before or after the lottery. *Cellular Lottery Further Recon.*, 59 Rad. Reg. 2d (P&F) at 410 n.17.

Petitioners' Procedural History. 1. Petitioners each filed applications for cellular authorizations with the FCC. Each of the petitioners certified in its applications that it complied with the alien ownership restrictions of Section 310(b) of the Act and Section 22.4(b) of the FCC's rules, 47 C.F.R. § 22.4(b). The applications of petitioners were selected in the lotteries for various RSA markets. Petitioners had filed as general partnerships and each general partnership had at least one alien general partner. Petitioners sought to file curative amendments following the lottery to change their ownership structures to limited partnerships or otherwise to remove their alien general partners.

Petitioners' applications were dismissed by the FCC's staff as unacceptable for filing because it proposed alien ownership that violated Section 310(b)(3) of the Act and Section 22.4(b)(3) of the FCC's rules. The Commission upheld the dismissal of petitioners' applications as unacceptable for filing pursuant to 47 C.F.R. § 22.20(a)(2) because that Section required that RSA cellular applications be filed in full compliance with all of the Commission's substantive rules, including the rules governing alien ownership. Pet. App. 22a. Consistent with its interpretation of Section 310(b) in *Citizenship Requirements (Wilner & Scheiner)*, 103 F.C.C.2d 511 (1985), *recon. denied in relevant part*, 1 FCC Rcd. 12, 14 (1986), the Commission held that the inclusion of aliens as general partners in petitioners' ownership structures

was not permissible. The Commission declined to accept petitioners' amendments offered to cure the violation, holding that its rules for processing cellular applications prevented the filing of amendments to cure non-compliant RSA applications. Pet. App. 23a.

The Commission also rejected petitioners' contentions that the dismissal of their applications violated the equal protection component of the Due Process Clause of the Fifth Amendment. The Commission found that distinctions based on alienage in federal statutes are permissible provided that the statute is not "wholly irrational" in meeting a legitimate government purpose. Pet. App. 28a (citing *Mathews* v. *Diaz*, 426 U.S. 67, 83 (1976)). Section 310(b) of the Act, the Commission concluded, was a permissible means of meeting Congress' intent to protect the security of domestic airwaves in the event of war. Pet. App. 28a.

2. The court of appeals unanimously denied a petition for review. The D.C. Circuit held that the Commission "was well within its authority to dismiss the applications." Pet. App. 13a. The court first held that the rules prohibiting certain levels of alien ownership in FCC authorizations were constitutional. Pet. App. 7a-10a. It then found that the FCC had properly interpreted its procedural rules in dismissing petitioners' defective applications. Pet. App. 10a-12a.

REASONS FOR DENYING THE PETITION

The D.C. Circuit's decision does not present any question that warrants review by this Court. The decision is not in conflict with the decision of any other circuit court of appeals and does not establish any new principle of law. The D.C. Circuit merely upheld the FCC's interpretations of its own procedural regulations, a matter on which agencies are accorded the highest deference. These regulations present no important issue of federal law, nor will these issues recur, because Congress and the Commission have promulgated new laws to govern the award of licenses for commercial mobile telephone service in the future by auction. Finally, the constitutional issue presented has been decided previously by this Court and the decision below is nothing more than a faithful application of those principles to petitioners' situation.

I. THE DISTRICT OF COLUMBIA CIRCUIT'S DECISION PROPERLY UPHELD THE FCC'S INTERPRETATION OF ITS OWN PROCEDURES AND THEREFORE PRESENTS NO IMPORTANT FEDERAL QUESTION FOR REVIEW BY THIS COURT.

A. Petitioners devote the majority of their petition to arguing that this Court should review the question whether the FCC properly followed its procedural regulations when it refused to allow petitioners to amend their defective applications. This issue is manifestly unworthy of further review. Courts accord " 'substantial deference' " to an agency when it is construing its own regulations. See *Martin* v. *Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 150 (1991) (quoting *Lyng* v. *Payne*, 479 U.S. 926, 939 (1986)); *San Luis Obispo Mothers for Peace* v. *NRC*, 789 F.2d 26, 30 (D.C. Cir.) (en banc), *cert. denied*, 479 U.S. 923 (1986).

The pertinent regulations are quite clear. If an application "does not comply with the Commission's rules, regulations, specific requirements for additional information

or other requirements," the application is "unacceptable for *filing*" and is therefore subject to dismissal at any point in the process. 47 C.F.R. § 22.20(a) (emphasis added). Furthermore, the Commission has made clear that, under 47 C.F.R. § 22.20(a), "applications are required to be acceptable for filing when tendered," and "the applicant has no right to resubmit a defective application with a curative amendment after the cutoff date for filing competing applications." *Ronald P. Trinchitella*, 4 FCC Rcd. 6360, 6361 (1989).

Petitioners' applications were "unacceptable for filing" because they did not comply with the Communications Act and the Commission's rules concerning alien ownership. Both the Act and the Commission's rules prohibit certain authorizations including cellular licenses from being issued to entities with certain levels of alien ownership. 47 U.S.C. § 310; 47 C.F.R. § 22.4(b). The Commission has held that both the Act and the rule apply with full force to partnerships, and not just to "corporations" in its narrowest sense. *Citizenship Requirements (Wilner & Scheiner)*, 103 F.C.C.2d 511, 514 (1985), *recon. denied in relevant part*, 1 FCC Rcd. 12, 14 (1986) (noting that the Act itself defines "corporation" to include "any corporation, joint-stock company, or association").[4] All petitioners were partnerships that contained at least one alien as a general partner at the time of their original applications, in violation of both Section 310 of the Act and Section 22.4 as previously interpreted in *Wilner*. Therefore, all of the applications were "unacceptable" when filed and subject to dismissal under 47 C.F.R. § 22.20(a).

Nonetheless, petitioners ask this Court to review the decision below on the grounds that they had a right to file curative amendments following their selection in the lot-

[4] It is axiomatic that a partnership is a form of association. *See* Uniform Partnership Act § 6 (1914) (defining partnership as "association of two or more persons to carry on as co-owners a business for profit").

tery process pursuant to 47 C.F.R. § 22.918(b). As the court below correctly held, however, Section 22.918(b) provides no such right. The sentence on which petitioners place so much emphasis (Pet. 12) states only that "[i]nformation *required by § 1.65* shall be filed . . . within 30 days of the Public Notice announcing the lottery results for all applications to serve Rural Service Areas." 47 C.F.R. § 22.918(b) (emphasis added).

Section 1.65 has never been interpreted to allow amendments necessary to bring an applicant into statutory compliance. On the contrary, Section 1.65 merely ensures the "continuing accuracy and completeness of information furnished in a pending application." 47 C.F.R. § 1.65(a). If such information is "no longer substantially accurate and complete in all significant respects," the applicant is required to "furnish such additional or corrected information." *Id.* The Commission routinely rejects attempts to cure disqualifying defects by means of a Section 1.65 amendment. See, *e.g.*, *PrimeMedia Broadcasting, Inc.*, 3 FCC Rcd. 4293 (1988) (rejecting attempt by broadcast applicant to use § 1.65 to cure a § 310(b) defect); *Queen City Cellular Communications*, 64 Rad. Reg. 2d (P&F) 582 (Com. Carrier Bur. 1987), *aff'd*, 67 Rad. Reg. 2d (P&F) 527 (1990) (rejecting cellular applicant's attempt to use Section 1.65 to cure disqualifying defect concerning required map filings). Indeed, "acceptance of an amendment for purposes of Section 1.65 may involve no determination as to the effect to be given it for other purposes." *Public Mobile Radio Services Rules*, 95 F.C.C.2d 769, 788-89 (1983).

Petitioners in effect concede this point by arguing that "implicit in the *opportunity* to amend RSA applications pursuant to 47 C.F.R. § 1.65 and 47 C.F.R. § 22.918(b) is the *opportunity* to correct application defects through post-lottery amendment." Pet. 13. Yet, petitioners fail to explain why Section 22.918(b) does not mean simply what it says. That section offers the winning applicant

the "opportunity" to make the requisite post-lottery informational amendments; no more, no less.[5] The Commission thus correctly held that the rules afforded petitioners no opportunity to bring themselves into compliance with Section 310(b) of the Act, and the court below properly upheld the FCC's interpretation of its own procedural regulations.

B. Petitioners argue that the FCC had not given applicants adequate notice that the alien ownership requirements were part of the "acceptability for filing criteria" (see Pet. 14-20), but here again the court below correctly upheld the Commission's interpretation of the Act and precedent. Incredibly, petitioners continue to rely on *Nevada Broadcasting Group, No.* BPCT-850725KO, 1986 FCC LEXIS 3215 (Mass Media Bur. June 19, 1986), as establishing that " 'aliens are not prohibited by Section 310(b) from applying for licenses, only from "holding" them.' " See Pet. 18 & n.17 (quoting *Nevada Broadcasting Group*, at *4). In context, the FCC staff actually held the opposite: it dismissed an application with a Section 310(b) defect because it was unacceptable for filing as of the original cut-off date under the rules for processing broadcast applications.[6]

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[5] Because cellular licenses are allocated on a lottery basis, Section 22.918(b) serves the interest of administrative efficiency. In order to prevent the Commission from having to process hundreds of Section 1.65 informational amendments that may ultimately be irrelevant, Section 22.918(b) prohibits all such amendments until after the lottery determines a winner. As the Commission has stated, the rule "strictly *limit*[*s*] the filing of amendments"; it does not expand the opportunities for amendment. *Cellular Lottery Rule Making*, 98 F.C.C.2d at 220 (emphasis added).

[6] The section quoted by petitioners goes on to state:

> *Nonetheless, applicants must also comply with all relevant procedural requirements.* In this regard, to aid in the orderly processing of applications for new stations, the Commission's Rules provide that applicants, such as NBG, must be on file by a specified cut-off date. Section 73.3572(c). Unless corrected

The cellular precedent cited by petitioners (see Pet. 19-20) similarly did not create any confusion about the applicable rules. In *Advanced Business Communications, Inc.*, 2 FCC Rcd. 3751 (1986), for example, the FCC first dismissed an application for a violation of the alien ownership rules, but later reinstated the application when the applicant demonstrated that its proposal never violated those rules.[7] Similarly, in *GTRW Partnership*, 2 FCC Rcd. 4160 (1987), the FCC granted a license to an applicant whose original application did *not* disclose any alien ownership. After the lottery, the applicant had corrected the application to disclose the presence of an alien in a permissible limited role. The FCC's decision never indicated that an applicant would be permitted to file post-lottery amendments to cure a disqualifying defect.[8] See Pet. App. 26a-27a. As the D.C. Circuit found, the FCC's procedural rules "alerted prospective applicants that they had to possess the qualifications to be a licensee on the day of filing, that one such qualification was compliance with section 310(b), and that no curative amendments would be accepted for non-complying applications." Pet. App. 12a. Because the court of appeals correctly upheld the Commission's interpretation of its own pro-

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> prior to the cut-off date, applications that are patently defective when tendered are returned and are not entitled to comparative consideration with other applications that are not defective and are substantially complete.

Nevada Broadcasting Group, at *4-5 (emphasis added). Indeed, the Commission dismissed the application because the applicant had included an alien as a general partner.

[7] The application had erroneously identified an alien as a "corporate secretary" rather than simply an office secretary. The Commission dismissed the application after the lottery, but allowed the applicant to report that the "secretary" was not an officer of the corporation.

[8] As petitioners note, the Commission has overruled *GTRW* to the extent that it suggests that applicants are permitted, post-filing, to make an alien general partner a limited partner.

cedural rules in dismissing petitioners' applications, further review by this Court is not warranted.

II. THE FEDERAL GOVERNMENT'S USE OF ALIENAGE AS A CRITERION FOR COMMON CARRIER RADIO LICENSE OWNERSHIP IS CONSTITUTIONAL.

A. Article I, Section 8, Clause 4 of the United States Constitution provides that "Congress shall have Power . . . To establish a uniform Rule of Naturalization." In *Graham* v. *Richardson,* 403 U.S. 365 (1971), this Court found that "[t]he National Government has 'broad constitutional powers in determining what aliens shall be admitted to the United States, the period they may remain, regulation of their conduct before naturalization, and the terms and conditions of their naturalization.'" *Id.* at 377 (quoting *Takahashi* v. *Fish & Game Comm'n,* 334 U.S. 410, 419 (1948)).

Pursuant to this constitutional authorization, Congress has adopted a limitation on the ownership of radio licenses by aliens. Section 310 of the Communications Act of 1934, as amended, provides that:

> No broadcast or common carrier or aeronautical en route or aeronautical fixed radio station license shall be granted to or held by . . . any corporation of which any officer or director is an alien . . . .

47 U.S.C. § 310(b). The statute also denies common carrier radio licenses to foreign governments, individual aliens, foreign corporations, and corporations more than one-fifth owned or controlled by foreign governments, aliens, or foreign corporations. *Id.* These provisions were adopted out of a general concern for national security; Congress legitimately feared the effect of allowing vital modes of communication to be controlled by potentially hostile aliens. See 47 U.S.C. § 151. Because this limitation was not "wholly irrational," it was properly

upheld by the court below. *Mathews* v. *Diaz*, 426 U.S. 67, 83 (1976).

In arguing that denying licenses to aliens violates equal protection, petitioners principally rely on cases construing the Equal Protection Clause of the 14th Amendment as applied to state legislation. While the Fifth Amendment's Due Process Clause does serve equal justice under law and does apply to both the federal and state governments, "the two protections are not always coextensive." *Hampton* v. *Mow Sun Wong*, 426 U.S. 88, 100 (1976). This Court explained:

> Not only does the language of the two Amendments differ, but more importantly, there may be overriding national interests which justify selective federal legislation that would be unacceptable for an individual State.

Id. (footnote omitted). Petitioners ignore this fundamental distinction embodied in our constitutional plan. Because petitioners' equal protection arguments are based on a false premise, there is no reason to review that issue in this case.[9]

B. First, petitioner incorrectly argues that the Federal Communications Commission has broadly expanded the congressional policy against alien ownership of common

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[9] In *Mathews*, this Court upheld a federal statute excluding certain aliens from enrollment in a supplemental Medicare insurance program. The Court found that the Due Process Clause prohibited the federal government only from using alienage as a basis for restrictions that were "wholly irrational." 426 U.S. at 83. The Court noted that the Due Process Clause does not require the federal government to give all of the advantages of citizenship to aliens, *id.* at 78, even though state governments are often required to do so by the Equal Protection Clause:

> [I]t is not "political hypocrisy" to recognize that the Fourteenth Amendment's limits on state power are substantially different from the constitutional provisions applicable to the federal power over immigration and naturalization.

Id. at 86-87.

carrier radio licenses enunciated in Section 310 of the Act, 47 U.S.C. § 310(b). Pet. 21 & n.21. As explained previously, the FCC merely implemented Congress' manifest purpose. See *supra*, p. 7 & note 4. It would be plainly inconsistent with Congress' decision to impose restrictions on alien ownership of radio licenses to allow aliens to gain ownership or control of these restricted licenses merely by altering the organizational form of their businesses.

Second, petitioner argues that the Commission has expanded congressional prohibitions on alien ownership of common carrier radio licenses by determining incorrectly that partners in a partnership hold powers that are comparable to those exercised by officers and directors in a corporation. See *Citizenship Requirements (Wilner & Scheiner)*, 103 F.C.C.2d 511, 520 n.43 (1985), *recon. denied in relevant part*, 1 FCC Rcd. 12, 14 (1986). However, it is equally axiomatic that partners in a partnership, like corporate officers and directors, both manage the business' day-to-day affairs and bind the entire partnership in relation to the outside world. See Uniform Partnership Act § 9 (1914). The applicability of Section 310 cannot be so narrowly confined to a particular form of business governance that would completely thwart the substance of the statutory restriction.

Finally, petitioners argue that under *Hampton* v. *Mow Sun Wong*, 426 U.S. 88 (1976), deference should not be accorded to the FCC's limitations on alien ownership because the Commission is "an independent regulatory agency" and not a political branch of the federal government.[10] Pet. 22. Petitioners misconstrue *Hampton*. In

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[10] Petitioners' semantics should not confuse the Court. The term "independent agency" signifies administrative independence only insofar as the agency is in some manner insulated from direct control. 1 J. Stein, G. Mitchell & B. Mezines, *Administrative Law* § 4.04 (1993). The FCC, however, is not insulated from politics. The FCC Commissioners are appointed by the President, subject

Hampton, this Court, applying "some judicial scrutiny," found a Civil Service Commission ("CSC") regulation based on alienage invalid under the Due Process Clause. 426 U.S. at 103. Congress gave the CSC the task of overseeing the federal civil service. However, on the CSC's own initiative, the agency decided to deny civil service appointments to aliens. In reviewing this regulation, the Court found that it was "appropriate to review the extent to which the policy has been given consideration by Congress or the President, and the nature of the authority specifically delegated to the Commission." *Id.* at 105. Even so, strict scrutiny was not applied. In invalidating the agency regulations, this Court found that the CSC's alienage restriction was "far removed from [its] normal responsibilities," *id.*, and had not emanated from Congress or the President, *id.* at 116.

In the present case, by contrast, Congress itself is the source of the limitation imposed on aliens. 47 U.S.C. § 310(b). Furthermore, Congress has delegated to the FCC the authority to make the rules and regulations necessary to enforce the provisions Congress enacted. 47 U.S.C. § 151. Therefore, the policy protected by the Commission's refusal to grant licenses to partnerships with alien partners emanates from Congress and is a legitimate restriction on aliens residing in this country at the pleasure of Congress. Therefore, the court of appeals correctly declined to do more than determine that the limitation on alien ownership of common carrier radio licenses was rational.

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to the advice and consent of the Senate, and charged with enforcing the Communications Act on behalf of Congress. *Id.* § 4.04[2][b]; 47 U.S.C. § 154(a). For a recent example of this Court's recognition of an independent agency exercising authority of a "significantly political nature," *see Mistretta* v. *United States*, 488 U.S. 361, 393 (1989).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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